

ORIGINAL

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)

Amendment of Section 73.202(b))

Table of Allotments)

FM Broadcast Stations)

(Arlington, The Dalles, Moro, Fossil, Astoria,)

Gladstone, Portland, Tillamook,)

Springfield-Eugene, Coos Bay, Manzanita)

and Hermiston, Oregon, and)

Covington, Trout Lake, Shoreline, Bellingham,)

Forks, Hoquiam, Aberdeen, Walla Walla,)

Kent, College Place, Long Beach and)

Ilwaco, Washington))

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MB Docket No. 02-136

RM-10458

RM-10663

RM-10667

RM-10668

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SEP 15 2004

To: Office of the Secretary

Attn: Chief, Media Bureau

Federal Communications Commission
Office of Secretary

**OPPOSITION TO MOTION FOR LEAVE TO FILE SUPPLEMENT
TO PETITION FOR RECONSIDERATION**

First Broadcasting Investment Partners, LLC ("First Broadcasting"), by its counsel, hereby opposes the Motion for Leave to File Supplement to Petition for Reconsideration filed by Mercer Island School District ("MISD") on August 31, 2004. The Commission should deny the motion and reject the supplement without further consideration, because consideration of the supplement is not relevant to a decision in this case.

1. The Communications Act requires that a petition for reconsideration of any action be filed within 30 days after public notice of the action. 47 U.S.C. § 405. Accordingly, the Commission requires a petition for reconsideration *and any supplement thereto* to be filed within the requisite 30 days. 47 C.F.R. § 1.429(d) (emphasis added). The Commission is without power to waive the 30-day time limit as to the initial petition for reconsideration, because that deadline, at least, is statutory. *Implementation of the Pay Telephone Reclassification and*

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Compensation Provisions of the Telecommunications Act of 1996, 18 FCC Rcd 7615 (2003). But if the Commission permitted a party to follow up its petition for reconsideration with untimely supplements at will, the 30-day time limit would be rendered a nullity. Accordingly, the Commission accepts a late-filed supplement only when the petitioner demonstrates adequate grounds for its consideration. *See 21st Century Telesis Joint Venture*, 16 FCC Rcd 17257, 17263 (2001), *aff'd*, 318 F.3d 192 (D.C. Cir. 2003).

2. MISD has not shown good cause for acceptance of its supplement. MISD asserts that the supplement is based on information disclosed in a recent application for KMCQ filed to implement the *Report and Order* in this proceeding. Motion at 2. However, that fact alone does not demonstrate good cause. MISD has not demonstrated why consideration of the supplement would have any bearing on the outcome of this case. In fact, the supplement is *not* relevant to a determination in this proceeding.

3. To understand why consideration of the supplement has no bearing on this case requires a preliminary review of the supplement itself. MISD argues in the supplement that although the allotment reference coordinates for Channel 283C3 at Covington, Washington would permit service to only 8.8 percent of the Seattle Urbanized Area, the facility proposed in the KMCQ application would provide service to 51 percent of the Urbanized Area. However, this difference is without any legal consequence. In certain cases, service to more than 51 percent of an Urbanized Area could require an analysis of the independence of the community of license from the Urbanized Area, under the factors set forth in *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) ("*Tuck*"). *See, e.g., Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995). But this is not one of those cases. Covington itself is within the Seattle Urbanized Area, so a *Tuck* showing was already required, even using the 8.8 percent coverage figure from the allotment reference coordinates. The petitioners provided that *Tuck* showing,

and MISD had ample opportunity to rebut it. Moreover, under its cover story of “newly discovered information,” MISD attempts to place before the Commission information that it could have submitted previously but did not. For example, MISD critiques the 8.8 percent figure recited above using information that was published in 2002. Supplement at 2 note 3. This is clearly impermissible, since MISD could have made this argument at any time but failed to do so.¹


4. Because there is no justification for re-arguing the application of the *Tuck* factors in this case at this late stage in the proceeding – long after the deadline for the filing of a petition for reconsideration has passed – and because MISD’s argument would have no bearing on the outcome of this case, the MISD supplement should be rejected without further consideration.

WHEREFORE, for the foregoing reasons, the Commission should deny MISD’s motion should be denied and its supplement rejected.

Respectfully submitted,

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September 15, 2004

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¹ MISD also engages in meaningless manipulation of statistics. Its statement that “92% of the 70 dBu population covered by KMCQ . . . is located within the urbanized area” is irrelevant and misleading. A low-powered station could be located *entirely* within the urbanized area and cover but a tiny fraction of the urbanized area population, yet 100% of its 70 dBu contour would still be within the urbanized area. This statistic has no analytical power whatsoever and is another reason why the Commission should reject the supplement.

CERTIFICATE OF SERVICE

I, Lisa M. Holland, a secretary in the law firm of Vinson & Elkins, do hereby certify that I have on this 15th day of September, 2004 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "Opposition to Motion" to the following:

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